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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 934

ROBERT CORPORA,

Appellant,

against

THE STATE OF NEW YORK,

Appellee.

ON APPEAL TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

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STATEMENT AS TO JURISDICTION

Opinions Below

None of the courts below wrote an opinion. The Court of Appeals, however, did certify by amendment of its remittitur that the federal questions here, were passed upon by that court (App. B).

Jurisdiction

(i) This is an appeal from a judgment in which the appellant was convicted of a violation of the Sabbath Law of New York, Section 2147 of the Penal Law, in that he, a clerk in a bookstore, sold books in the store on a Sunday.

(ii) The date and entry of the judgment of the New York Court of Appeals is January 7, 1965. Notice of Appeal was filed in the Criminal Court of the City of New York on January 19, 1965.

(iii) The jurisdiction of this court is conferred by 28 U.S.C. Sect. 1257 (2).

Statute Involved

"Sect. 2147. Public Traffic on Sunday.

All manner of public selling or offering for sale of any property upon Sunday is prohibited, except as follows:

* * * * * *

4. Prepared tobacco, bread, milk, eggs, ice, soda water, fruit, flowers, confectionary, souvenirs, newspapers, magazines, gasoline, oil, tires, monuments, drugs, medicines and surgical instruments, may be sold in places other than a room where spirituous or malt liquors or wines are kept or offered for sale and may be delivered at any time of the day.

As amended L. 1958, c. 771."

McKinney's Consolidated Laws of New York Annotated, Vol. 39, Penal Law.

Questions Presented

1. Is Section 2147 of the Penal Law an invalid discrimination against vendors of books?

2. Does Section 2147 interfere with the dissemination of literature and thus deprive appellant of the protection of the First and Fourteenth Amendments?

Statement

The appellant was a clerk in a bookstore in the City of New York on August 18, 1963, a Sunday. On that day at about 2:00 P.M. he was in the bookstore, selling books. The store did not sell any magazines or newspapers.

It was testified to by the president of the owner of the store that the store sold books of all types, including religious books, several hundreds of that kind. As an expert he testified that books are sold widely throughout New York City on Sundays, in railroad stations, newsstands, subways and museums. So prevalent and widespread is the sale of books on Sundays, that the conclusion is that books can be bought everywhere on a Sunday except in a bookstore (pp. 12, 13).

Stage and Manner of Raising Federal Questions

The questions raised here were raised by motion to dismiss at the end of appellee's case and at the end of the entire case (pp. 10, 14). The trial court denied the motions. The appellant was convicted and received a suspended sentence (p. 16). Upon appeal to the Appellate Term and subsequently, by leave granted, to the Court of Appeals, the same questions were raised in the brief of appellant. The Court of Appeals so certified (App. B).

The Questions Are Substantial

The appeal to the New York Court of Appeals was taken by permission of a judge of that court who certified that a question of law had arisen which should be reviewed by that court.

A novel point is raised as to the unequal treatment of distributors of books on Sundays as against the permitted sale of magazines and newspapers on that day. Another

novel point is whether the dissemination of ideas may be halted on a Sunday through the banning of sales of books on that day. This should be considered in the light of the permitted dissemination of ideas, even for profit, by other instrumentalities, such as television and radio on Sundays.

The statute denies the defendant the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

Under this point the appellant attacks the law on its face and as applied to him, as being discriminatory.

The law is discriminatory on its face and as applied.

It will be noticed that subdivision 4 of Section 2147 exempts from its scope the sale of newspapers and magazines. These are media of communication. So are books. There can be little reason to support a proscription of the sales of these means of expressing of ideas. Assuming that newspapers are preferred because their longevity is short. But what justifies a preference for magazines? There is no basis or rationale to distinguish a book from a magazine. Many books have been magazine articles. A notable example is that famed title "The Autocrat at the Breakfast Table" by Oliver Wendell Holmes. It first appeared in twelve installments in the long-lived magazine, The Atlantic Monthly, see Encyclopedia Brittanica (14 edition), Volume 11, page 677, "Oliver Wendell Holmes." See also Catherine D. Bowen, "Yankee from Olympus," page 122. Likewise, Hale, "The Man Without a Country" first appeared as a magazine item in The Atlantic Monthly, "Encyclopedia Brittanica" 14 ed. vol. II page 87. Similar instances can be multiplied at length.

Indeed, when one considers the purpose of the statute as found in Section 2140 (*People* v. *Dunford*, 207 N. Y. 17; *People* v. *Deen*, 4 N. Y. 2d 708), to avoid serious in-

terruptions of the repose of the community, the sale of books as well as the sale of newspapers and magazines do not offend. Sales of publications is a laudatory one (aside from the fact that this store sells Bibles and religious literature, p. 12), and stands at least higher than the sale of spirituous liquors, which can be purchased on a Sunday.

The evidence shows that in New York City, books are sold on Sundays by such public-supported places like the Metropolitan Museum of Art, American Museum of Natural History, The Bronx Zoo and kindred places (p. 13). Sales on Sundays of books takes place at candy stores and newspaper stands in which newspapers and magazines are also sold. Books are sold widely and commonly in drug stores, railroad stations and in subways on Sundays. The conclusion is that books can be readily bought everywhere on Sunday, except in a bookstore as defendant's expert testified (pp. 12-13).

In this connection should be considered the higher rank that free speech enjoys over ordinary commercial activities, Smith v. *California,* 361 U. S. 147.

Likewise, judicial notice can be taken of the fact that other purveyors of ideas who derive remuneration for their services, like television, and motion pictures, operate without statutory restriction on Sundays.

Laws must apply equally to pass muster of the Fourteenth Amendment. It can well be said that democracy has it roots in such attitude toward law. True, activities may be classified, but there must be a rational basis for the classification. *Yick Wo* v. *Hopkins,* 118 U. S. 356; *Skinner* v. *Oklahoma,* 316 U. S. 535. To be a reasonable classification, there must be a reasonable relation between the means adopted and the object sought to be attained. The object of the Sabbath Law is to gain repose on a Sunday for the community. That object may or may not be attained by forbidding sales of those publications.

But they are both of the same character and therefore the exclusion of one, books, has no rational basis for classification.

This is not a case such as permitting drug stores to remain open on Sundays, but not bookstores. There, a rational distinction can be offered. But within the same occupation, that of distributing publications, there is no basis for a difference in classification. To permit the sale of magazines, but not of books is comparable to permitting fruit vendors to sell apples on Sundays, but not pears. Such an invidious distinction can hardly pass constitutional muster as being rational.

This distinction sets this case off from cases such as *McGowan* v. *Maryland*, 366 U. S. 420, cited below by respondent, *Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, 366 U. S. 582, and *Braunfeld* v. *Brown*, 366 U. S. 599. In those cases the classification rested on permitting sales at certain localities, the places being those connected with a permitted activity on a Sunday, such as sales of toilet items at a beach bathhouse, but not at a department store. In such a case it is merely the location that determines the difference in treatment. In this case, a different principle is involved. It is that of discrimination among the form and makeup of publications—magazines may be sold, but not books.

This case is akin to the successful challenge against classification in *Skinner* v. *Oklahoma*, 316 U. S. 535. There, a sterilization law, could be invoked against certain types of criminals, but not against others. Embezzlers were not subject to the law, but thieves were. The Court held there was no reasonable basis for the distinction, and struck down the statute.

The statute interferes with the freedom of publication.

The right protected by the Fourteenth Amendment is not only the right to publish, but also to distribute.

Schneider v. *State*, 308 U. S. 147; *Cantwell* v. *Connecticut*, 310 U. S. 296.

The right of free expression is a preferred right; which means that other interests of lower rank must yield. See, McKay, "The Preference for Freedom," New York University Law Review, November, 1959, Volume 34, pages 1182-1227. *Sherbert* v. *Verner*, 374 U. S. 398; *Smith* v. *California*, *supra*.

The statute interferes with that right. Dissemination of ideas whether for profit or for pleasure is a seven-day, twenty-four hour affair, as witnessed by television and radio broadcasting. The right to disseminate ideas cannot be curtailed by the observation of a Sabbath, if for no other reason that the distribution may be of religious books (ideas) *as found in this store*, as well as books for relaxation and repose on Sunday as distributed by this store. And the fact that the distribution of ideas is motivated by a profit does not deprive the distributor from protection of the Fourteenth Amendment. *Jamison* v. *Texas*, 318 U. S. 413; *Grosjean* v. *American Press Co.*, 297 U. S. 233, 249; *Jones* v. *Opelika*, 316 U. S. 584; *Schneider* v. *State*, 308 U. S. 147; *Follett* v. *McCormick*, 321 U. S. 573; *Murdock* v. *Pennsylvania*, 319 U. S. 105; *Largent* v. *Texas*, 318 U. S. 418; *Winters* v. *New York*, 333 U. S. 507; *Burstyn* v. *Wilson*, 343 U. S. 495, 501; *Breard* v. *Alexander*, 341 U. S. 622, 642; *Thomas* v. *Collins*, 323 U. S. 516.

If from the foregoing it is concluded that a speaker cannot be denied the right to speak or pass literature on the street, for a consideration, even on a Sunday, it follows therefore, that a distributor of literature not on the streets, but in a store, is likewise protected.

Here again, there is need for a reminder that since the case does not deal with ordinary merchandise, but with a medium of expression, different treatment must be accorded, with the objective that there be no interference with the dissemination of ideas any day of the week.

The statute, if enforced would prevent the distribution of ideas by bookstores on Sundays, leaving the field of communication of ideas, even for profit, to television and radio. The law is thus not only discriminatory, but also an impairment of the guarantee of the freedom to disseminate publications.

Respectfully submitted,

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APPENDIX A

Remittitur and Amendment Thereof.

COURT OF APPEALS

State of New York, ss:

Please in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 7th day of January, in the year of our Lord one thousand nine hundred and sixty-five, before the Judges of said Court.

Witness,

The Hon. Charles S. Desmond,
Chief Judge, Presiding,

Raymond J. Cannon, Clerk.

Remittitur January 7, 1965.

THE PEOPLE, ETC.,

Respondent,

against

ROBERT CORPORA,

Appellant.

BE IT REMEMBERED, That on the 25th day of June in the year of our Lord one thousand nine hundred and sixty-four, Robert Corpora, the appellant, in this cause, came here unto the Court of Appeals, by Emanuel Redfield, his attorney and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Term of the Supreme Court in and for the First Judicial De-

partment. The People, etc., the respondent in said cause, afterwards appeared in said Court of Appeals by Frank S. Hogan, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, is hereunto annexed.

WHEREUPON, the said Court of Appeals, this cause having been submitted, after due deliberation had thereon, did order and adjudge that the judgment herein be and the same hereby is affirmed. And thereafter a motion to amend the remittitur having been granted this remittitur is hereby amended by adding thereto the following: Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz.: Defendant argued that Section 2147 of the Penal Law of the State of New York denies him the equal protection of the laws under the Fourteenth Amendment and interferes with the free exercise of the press protected by the First and Fourteenth Amendments. The Court of Appeals held that there was no violation of the defendant's constitutional rights under either of these Amendments.

And it was also further ordered, that the record aforesaid, and the proceeding in this Court, be remitted to the Criminal Court of the City of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgment and order be affirmed, as aforesaid.

AND hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Criminal Court of the City of

Appendix A

New York before the Judges thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Criminal Court before the Judges thereof, etc.

RAYMOND J. CANNON,
Clerk of the Court of Appeals
of the State of New York.

Court of Appeals, Clerk's Office,
Albany, January 7, 1965.

I hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

Seal

RAYMOND J. CANNON,
Clerk.

APPENDIX B

Order Amending Remittitur.

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Eleventh day of February A. D. 1965.

Present, HON. CHARLES S. DESMOND, Chief Judge, presiding.

Mo. No. 142

THE PEOPLE &c.,

Respondent,

vs.

ROBERT CORPORA,

Appellant.

A motion to amend the remittitur in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted, the return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

> Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz.: Defendant argued that

section 2147 of the Penal Law of the State of New York denies him the equal protection of the laws under the Fourteenth Amendment and interferes with the free exercise of the press protected by the First and Fourteenth Amendments. The Court of Appeals held that there was no violation of defendant's constitutional rights under either of these Amendments.

AND the Criminal Court of the City of New York hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

GEARON KIMBALL,
Deputy Clerk.

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ROBERT CORPORA,

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against

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

On Appeal from the Court of Appeals
of the State of New York

APPELLEE'S MOTION TO DISMISS OR AFFIRM

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IN THE

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Appellant,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

On Appeal from the Court of Appeals
of the State of New York

APPELLEE'S MOTION TO DISMISS OR AFFIRM

Statement as to Jurisdiction

This is an appeal from a decision of the Court of Appeals of the State of New York, entered January 7, 1965, unanimously affirming the judgment of the Criminal Court of the City of New York, New York County, rendered October 24, 1963, which convicted the appellant, after trial, of violating Section 2147 of the New York Penal Law. The jurisdiction of this Court is conferred by 28 U. S. C. §1257(2).

Questions Presented

(1) Whether Section 2147 of the Penal Law, on its face or as applied here, denies the appellant the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

(2) Whether Section 2147, on its face or as applied to this appellant, is an interference with the right of publication and distribution guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

The Statute Involved

Section 2147 of the Penal Law reads, in pertinent part:

> "All manner of public selling or offering for sale of any property upon Sunday is prohibited, except as follows:
>
> • • •
>
> 4. Prepared tobacco, bread, milk, eggs, ice, soda-water, fruit, flowers, confectionery, souvenirs, newspapers, magazines, gasoline, oil, tires, cemetery monuments, drugs, medicine and surgical instruments may be sold and may be delivered at any time of the day." As amended by L. 1960, c. 729.

McKinney's Consolidated Laws of New York Annotated, Volume 39, Penal Law.

Statement of Facts

The facts in this case are not disputed. On Sunday, August 18, 1963, at about 2:45 p.m., the appellant sold a bound book to an unknown person at a book store located at 651 Lexington Avenue, City and County of New York (Record on Appeal, pp. 8-9). There is testimony on the record that books are sold on Sunday at the Metropolitan Museum of Art, American Museum of Natural History, Bronx Zoo and other museums and historical societies throughout New York City, as well as being sold at some of the newsstands located in railroad and subway stations and at some of the stationery stores which also sell newspapers (*id.* at 12-13). The appellant was convicted, after trial, of violating Penal Law §2147, and given a suspended sentence.

ARGUMENT

POINT I

Section 2147 of the New York Penal Law, either on its face or as applied, does not violate the equal protection clause of the United States Constitution.

It is well established that a state statute may not be struck down as offensive to equal protection in its schemes of classification unless it is obviously arbitrary, or so patently without reason when considered in the light of the statute's objectives that no conceivable state of facts could be found to justify them [*e.g.*, *McGowan* v. *Maryland*, 366 U. S. 420, 426, 535 (1960); *Metropolitan Casualty Insurance Co.* v. *Brownell*, 294 U. S. 580, 584 (1935); *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78-9 (1911)].

Plainly there is a rational basis for distinguishing between the sale of books and the sale of newspapers and magazines for the purpose of Section 2147. The legislature has set aside a day of rest and relaxation for the physical and moral welfare of the members of the community by enacting a statutory scheme which prohibits specified activities on Sunday with some exceptions as to necessities, recreation and conveniences [*People* v. *Friedman*, 302 N. Y. 75, 80 (1950), *appeal dismissed* 341 U. S. 907 (1951)]. The bustling, competitive activity of selling is forbidden, except in those instances involving commodities deemed essential to the public's welfare or its quest for needed relaxation. As opposed to books, newspapers and to a lesser extent magazines perform the necessary function of conveying immediate, ever-changing ideas and comments upon daily and weekly events which, to be effective and fully appreciated, must be distributed with dispatch before the articles become outdated. Moreover, magazines and newspapers have to be considered together for the purpose of the statute because of the impracticability of enforcing a distinction between similar items commonly sold at the same place of business. Since magazines and newspapers are almost always sold at the same commercial locations, the exception made for magazines does not add many, if any, new selling establishments to those already permitted to operate on Sunday. This would not be true in the case of books, where hundreds of additional stores in New York City alone would be opened to patronage by the lifting of the prohibition.

The fact that some books are sold in museums, zoos, drug stores, stationery stores selling newspapers and in transport stations does not evidence conscious discrimina-

tory enforcement, but merely indicates (1) that some of the books sold, such as art books sold by museums, come under the exempt classification of "souvenirs" [Penal Law §2147 (4)], and (2) that there is some excusable non-enforcement as to the sale of books in businesses legally open on Sunday for purposes of transportation or for the sale of permitted commodities such as drugs [see *Snowden* v. *Hughes*, 321 U. S. 1, 8-9 (1943); *People* v. *Friedman*, *supra*, at 80-1].

Thus, a rational and non-discriminatory scheme, dictated by the purposes of the Sabbath Law, is as much geared to the nature of the place of business allowed to operate as it is to the nature of the item sold. An art gallery, railroad terminal, or drug store, whose principal function is consistent with the Sabbath atmosphere, may operate on Sunday and no useful purpose would be served by curtailing the sale of books which is normally incidental to the functioning of such enterprises. But such incidental sales do not justify the additional commercial operation of stores whose principal function is the sale of books.

It is wholly beside the point of the present case to speculate upon any hypothetical violation by a book-seller operating by concession in a place legally open on Sunday. The point is that the application of the penal sanction of Section 2147 to this appellant, who operated his bookstore independently of any exempt activity, was not constitutionally arbitrary and discriminatory application of the law.

Nor is there any legitimate purpose here in debating the value of opening bookstores for business on Sunday.

It may well be that the sale of books is consistent with the serious cultural pursuits or at least restful entertainment allowed for Sabbath pastimes. If so, it is for the legislature to say. In arriving at the list of permitted commerce, that body, as the community's representatives, reached a judgment which should not be judicially gainsaid [see *Carmichael* v. *Southern Coal Co.*, 301 U. S. 495, 525 (1937)].

POINT II

The statute does not unreasonably interfere with the constitutionally protected right of publication and distribution.

The freedom of speech and of the press is not absolute, and the state may enact reasonable restrictions in the interest of public safety, health, welfare or convenience [*e.g.*, *Schneider* v. *State*, 308 U. S. 147 (1939)]. The time and the place of publication and distribution [*Breard* v. *Alexandria*, 341 U. S. 622, 641-5 (1951); *Cox* v. *New Hampshire*, 312 U. S. 569, 575-8 (1941); see *Edwards* v. *South Carolina*, 372 U. S. 229, 83 S. Ct. 680, 684 (1963)] as well as the manner of communication [*Kovacs* v. *Cooper*, 336 U. S. 77 (1949)] may be regulated by the legislature. Books by their very nature and choice of subject matter do not require daily distribution in order to accomplish their purpose or to be financially successful. Section 2147 merely forbids the sale of books, along with the sale of numerous other commodities, one day a week, on the Sabbath, not for the purpose of censorship or hindering effectiveness, but solely for the purpose of limiting commercial activity. When considered in the light of its objective and its appli-

cation to other merchandise, Section 2147 cannot be classified as an unreasonable restraint on free expression [*cf. Mabee* v. *White Plains Pub. Co.*, 327 U. S. 178, 184 (1946)].

Conclusion

The appeal should be dismissed, or, in the alternative, the decision of the New York Court of Appeals should be affirmed.

Respectfully submitted,

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March, 1965

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